21459 SERVICE DATE - JULY 14, 1999
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SURFACE TRANSPORTATION BOARD[1]

DECISION

No. 41594

NEWMAN LIGHTING COMPANY D/B/A NULITE, LTD.
--PETITION FOR DECLARATORY ORDER--CERTAIN
RATES AND PRACTICES OF JONES TRUCK LINES, INC.

Decided: July 8, 1999

We find that collection of the undercharges sought in this proceeding would be an unreasonable practice under 49 U.S.C. 10701(a) and section 2(e) of the Negotiated Rates Act of 1993, Pub. L. No. 103-180, 107 Stat. 2044 (NRA) (now codified at 49 U.S.C. 13711). Because of our finding under section 2(e) of the NRA, we will not reach the other issues raised in this proceeding.

BACKGROUND

This matter arises out of a court action in the United States Bankruptcy Court for the Western District of Arkansas, Fayetteville Division, in Jones Truck Lines, Inc. v. Newman Lighting Company d/b/a Nulite Ltd., A.P. No. 93-8582. The court proceeding was instituted by Jones Truck Lines, Inc. (Jones or respondent), a former motor common and contract carrier, to collect undercharges from Newman Lighting Company d/b/a Nulite Ltd. (Nulite or petitioner). Jones seeks undercharges of $5,039.26 (plus interest) allegedly due, in addition to amounts previously paid, for services rendered in transporting 48 shipments of flourescent light fixtures between July 18, 1988, and November 17, 1988. The shipments were transported from petitioner's facilities in Commerce City, CO, to points in Indiana, Georgia, Louisiana, Minnesota, Arkansas, Kentucky, Oklahoma, Texas, and Mississippi. By order entered June 12, 1995, the court stayed the proceeding to enable the parties to submit the issue of unreasonable practice to the ICC for resolution.

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (the ICC Termination Act or the Act), which was enacted on December 29, 1995, and took effect on January 1, 1996, abolished the Interstate Commerce Commission (ICC) and transferred certain functions and proceedings to the Surface Transportation Board (Board). Section 204(b)(1) of the Act provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the Act. This decision relates to a proceeding that was pending with the ICC prior to January 1, 1996, and to functions that are subject to Board jurisdiction pursuant to 49 U.S.C. 13709-13711. Therefore, this decision applies the law in effect prior to the Act, and citations are to the former sections of the statute, unless otherwise indicated.

Pursuant to the court order, petitioner, on July 5, 1995, filed a petition for declaratory order requesting the ICC to resolve issues of unreasonable practice and rate reasonableness. By decision served July 12, 1995, the ICC established a procedural schedule for the submission of evidence on non-rate reasonableness issues. On September 11, 1995, petitioner filed its opening statement. Respondent filed its statement of facts and argument on September 28, 1995, and Nulite submitted its rebuttal on October 31, 1995.

Petitioner asserts that it is a small business concern exempt from respondent's undercharge liability claims under 49 U.S.C. 10701(f)(9) [now codified at 49 U.S.C. 13709(h)].[2] It further asserts that respondent's attempt to collect undercharges constitutes an unreasonable practice under section 2(e) of the NRA and that the rates Jones seeks to assess are unreasonable. Mr. Brant Ward, President of Nulite, states that representatives of Jones quoted rates to Nulite personnel which were relied upon by Nulite in tendering its traffic to Jones. According to Mr. Ward, Jones billed Nulite for its services at the quoted rates and Nulite fully paid the originally assessed charges when due without objection from Jones. Attached to petitioner's opening statement is a document signed by a representative of Jones entitled "Transportation Agreement" (TA), indicating that, effective June 8, 1987, Jones would provide Nulite with a 52% discount off class rates, subject to a minimum charge of $34, when transporting Nulite's shipments from Commerce City, CO, to the carrier's direct service points (Exhibit A). Petitioner also states that numerous other motor carriers offered comparable services; that discounts were available to Nulite at the time the subject services were rendered; and that petitioner would never have tendered its traffic to Jones at the rates it now seeks to assess.

Jones contends that the discounts and/or rates initially assessed were not authorized by an applicable filed tariff in effect at the time the subject shipments were transported. It asserts that petitioner failed to meet the requirements of the tariff authorizing the originally applied discount and minimum charge until December 13, 1988, when it formally filed a tariff participation request with the carrier. Respondent further contends that section 2(e) of the NRA does not govern this proceeding and contests the applicability of that provision on both statutory and constitutional grounds.[3]

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[2] As indicated in the procedural decision served July 12, 1995, at 4, the Board is not the proper forum for determining whether an entity is a small business subject to the section 10701(f)(9) exemption. We have recognized that the court in which the undercharge action is pending or the Small Business Administration, the administrative agency charged with the administration of the relevant statute, would be the appropriate forums for resolving this issue. See Rauland-Borg Corporation-Petition for Declaratory Order-Certain Rates and Practices of Lifschultz Fast Freight, Inc. No. 40559 (STB served Apr. 24, 1998) and Ceres Industries Corp. v. Bruce E. De'Medici, Trustee for Lifschultz Fast Freight Corp., No. 40870 (ICC served Mar. 23, 1994).

[3] Jones argues that section 2(e) of the NRA is inapplicable to bankrupt carriers, may not be applied retroactively, and is unconstitutional. We point out that six federal circuit courts of appeals

(continued...)

Respondent supports its position with a verified statement from Stephen L. Swezey, Senior Transportation Consultant for Carrier Service, Inc. (CSI), the organization authorized by the bankruptcy court to provide rate audit and collections services for Jones. Attached as Appendix A to Mr. Swezey's statement are 10 sample balance due freight bill corrections issued by CSI on behalf of respondent that contain original freight bill data as well as asserted balance due amounts. The "corrected" freight bills indicate that a 52% discount or a $34 minimum charge was originally applied or assessed for each of the sample shipments and that the correction adjustments resulted in the disallowance of the discounts and the re-rating of the minimum charge. Mr. Swezey asserts that Item 160 of ICC tariff JTLS 630 requires the shipper to provide written notification of its participation in tariff ICC 630 before the shipper can receive the benefits of the discount provisions of that tariff.[4] Mr. Swezey states that the discount provisions of tariff ICC 630 did not become effective with respect to petitioner's traffic until petitioner submitted a Customer Participation

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[3](...continued)
and virtually every other federal court that has considered respondent's applicability arguments have determined that the remedies provided in section 2 of the NRA apply to the undercharge claims of bankrupt carriers such as Jones. See Whitaker v. Power Brake Supply, Inc., 68 F.3d 1304 (11th Cir. 1995) (Power Brake); Jones Truck Lines, Inc. v. Whittier Wood Products, Inc., 57 F.3d 642 (8th Cir. 1995) (Whittier Wood); In the Matter of Lifschultz Fast Freight Corporation, 63 F.3d 621 (7th Cir, 1995); In re Transcon Lines, 58 F.3d 1432 (9th Cir. 1995) cert. denied, 116 S. Ct. 1016 (1996); In re Bulldog Trucking, Inc., 66 F.3d 1390 (4th Cir. 1995); Hargrave v. United Wire Hanger Corp., 73 F.3d 36 (3d Cir. 1996); see also, e.g., Jones Truck Lines, Inc. v. AFCO Steel, Inc., 849 F. Supp. 1296 (E. D. Ark. 1994).

Further, as the courts have also held consistently, section 2(e), by its own terms and as more recently amended by the ICC Termination Act, may be applied retroactively against the undercharge claims of defunct, bankrupt carriers that were pending on the NRA's enactment. See, e.g., Jones Truck Lines, Inc. v. Scott Fetzer Co., 860 F. Supp. 1370, 1375-76 (E.D. Ark. 1994); North Penn Transfer, Inc. v. Stationers Distributing Co., 174 B.R. 263 (N.D. Ill. 1994); Gold v. A.J. Hollander Co. (In re Maislin Indus.), 176 B.R. 436 (Bankr. E.D. Mich. 1995); cf. Jones Truck Lines, Inc. v. Phoenix Products Co., 860 F. Supp. 1360 (W.D. Wisc. 1994).

Lastly, in response to respondent's "takings" challenge, the Eighth Circuit in Whittier Wood and the Eleventh Circuit in Power Brake have concluded that the NRA does not work an unconstitutional taking under the Fifth Amendment. 57 F.3d at 649-52; 68 F.3d at 1306 n.3. We point out that the courts have consistently rejected that argument, as well as respondent's "separation of powers" argument and its other constitutional challenges to the NRA. See, e.g., Gold v. A.J. Hollander, supra; American Freight System, Inc. v. ICC (In re American Freight System, Inc.), 179 B.R. 952 (Bankr. D. Kan. 1995); Rushton v. Saratoga Forest Products, Inc. (In re Americana Expressways), 177 B.R. 960 (D. Utah 1995), rev'g 172 B.R. 99 (Bankr. D. Utah 1994); Zimmerman v. Filler King Co. (In re KMC Transport), 179 B.R. 226 (Bankr. D. Idaho 1995); Lewis v. Squareshooter Candy Co. (In re Edson Express), 176 B.R. 54 (D. Kan. 1994).

[4] Item 2052 of tariff ICC JTLS 630 provides for 52% discount off less-than-truckload (LTL) class rated shipments.

Request (CPR), a document bearing an effective date of December 13, 1988 (Appendix C), indicating compliance with the participation requirements of Item 160 became effective. As the December 13, 1988 effective date of this CPR occurred subsequent to the movement of the shipments at issue, Mr. Swezey maintains that the originally applied discounts and minimum charges assessed in the original freight bills were not applicable to the subject shipments, and that the corrected freight bills reflect the appropriate charges for the services rendered.

DISCUSSION AND CONCLUSIONS

We dispose of this proceeding under section 2(e) of the NRA. Accordingly, we do not reach the other issues raised.

Section 2(e)(1) of the NRA provides, in pertinent part, that "it shall be an unreasonable practice for a motor carrier of property . . . providing transportation subject to the jurisdiction of the [Board] . . . to attempt to charge or to charge for a transportation service . . . the difference between the applicable rate that [was] lawfully in effect pursuant to a [filed] tariff . . . and the negotiated rate for such transportation service . . . if the carrier . . . is no longer transporting property . . . or is transporting property . . . for the purpose of avoiding application of this subsection."[5]

We note that section 2(e)'s availability is not limited to situations where the originally billed rate was unfiled. In evaluating whether a carrier's collection efforts would be an "unreasonable practice" under section 2(e), the Board must consider, inter alia, whether the shipper was offered a rate by the carrier "other than that legally on file with the Board for the transportation service." Section 2(e)(2)(A) (emphasis added). If the carrier and shipper agreed to a price that was embodied in a filed rate that cannot be applied to the involved shipments, then the shipper was offered a rate not legally on file "for [that] transportation service." Thus, even if "some of [a carrier's undercharge claims] are based on it billing and collecting an erroneous [filed] rate, if the so-called erroneous rate was negotiated between the shipper and [carrier] and if the shipper reasonably relied on the rate, the rate would meet the definition of a 'negotiated rate' and trigger the application of the provisions of the NRA. American Freight System, Inc. v. ICC (In re American Freight System), 179 B.R. 952, 957 (Bankr. D. Kan. 1995).

It is undisputed that Jones no longer transports property. Accordingly, we may proceed to determine whether Jones' attempt to collect undercharges (the difference between the applicable filed tariff rate and the negotiated rate) is an unreasonable practice.

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[5] Section 2(e), as originally drafted, applied only to transportation service provided prior to September 30, 1990. Here, we note, the shipments at issue moved before September 30, 1990. In any event, 49 U.S.C. 13711(g), which was enacted in the ICC Termination Act as an exception to the general rule noted in footnote 1 to this decision, deletes the September 30, 1990 cut-off date as to proceedings pending as of January 1, 1996.

Initially, we must address the threshold issue of whether sufficient written evidence of a negotiated rate agreement exists to make a section 2(e) determination. Section 2(e)(6)(B) defines the term "negotiated rate" as one agreed on by the shipper and carrier "through negotiations pursuant to which no tariff was lawfully and timely filed . . . and for which there is written evidence of such agreement." Thus, section 2(e) cannot be satisfied unless there is written evidence of a negotiated rate agreement.

Here, the record contains a copy of a 1987 TA signed by a representative of Jones indicating that a 52% discount off class rates, subject to a minimum charge of $34, would apply to Nulite traffic; 10 representative balance due bills indicating initially assessed charges to which a 52% discount was applied or a $34 minimum charge was assessed; and a tariff provision (Item 2052 of tariff ICC JTLS 630) providing for the application of a 52% discount off class rates. We find this evidence sufficient to satisfy the written evidence requirement. E. A. Miller, Inc.--Rates and Practices of Best, 10 I.C.C.2d 235 (1994) (E.A. Miller).[6] See William J. Hunt, Trustee for Ritter Transportation, Inc. v. Gantrade Corp., C.A. No. H-89-2379 (S.D. Tex. March 31, 1997) (finding that written evidence need not include the original freight bills or any other particular type of

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[6] Jones, at p. 13 of its statement filed September 28, 1995, argues that freight bills do not constitute written evidence. Respondent contends that, under section 2(e)(2)(D) of the NRA, the Board must consider whether the negotiated rate "was billed and collected by the carrier" in making its merits determination as to whether a carrier's conduct was an "unreasonable practice." This section, according to Jones, contemplates that freight bills reflecting the negotiated rate were issued by the carrier, and the Board must examine the freight bills to determine if section 2(e) has been satisfied. Jones asserts that allowing freight bills to satisfy the written evidence requirement would make the written evidence provision superfluous because the Board, under section 2(e)(2)(D), must independently consider the collected freight bill.

The ICC and the Board have consistently rejected this argument. Section 2(e)(2)(D) requires the Board to consider "whether the [unfiled] rate was billed and collected by the carrier." There is no requirement under this provision or the NRA's legislative history that the Board use a carrier's freight bills for that determination. A carrier may separately attest, or submit or concede in pleading, that the negotiated, unfiled rate was billed and collected, and there is nothing to preclude the Board from using such statements (or other evidence) in finding that section 2(e)(2)(D) was satisfied.

Even if the Board uses freight bills to satisfy this element, however, it is not inappropriate for it to use those same bills to satisfy the "written evidence" requirement of section 2(e)(6)(B). The carrier's argument might be more persuasive if the written evidence requirement was a "sixth" element of the merits determination under section 2(e)(2), but it is not. Rather, as the ICC previously indicated, it is simply a threshold definitional requirement needed to invoke section 2(e). See E.A. Miller, supra, 239-40. Once that requirement is satisfied by freight bills (or other contemporaneous written evidence), there is nothing to suggest that the same evidence could not be used as part of the Board's separate five-part analysis under section 2(e)(2) to determine whether the carrier's undercharge collection is an unreasonable practice.

evidence, as long as the written evidence submitted establishes that specific amounts were paid that were less than the filed rate and that the rates were agreed upon by the parties).

In this case, the evidence indicates that the parties conducted business in accordance with agreed-to negotiated discount rates that were originally billed by Jones and paid for by Nulite. The originally assessed rates identified in the sample balance due bills, which are in total conformity with the rates specified in the 1987 TA, confirm the unrefuted testimony of Mr. Ward and reflect the existence of negotiated rates. The evidence further indicates that Nulite relied upon the agreed-to discount rates in tendering the subject shipments to Jones, and that petitioner would not have used Jones to provide transportation service had respondent attempted to charge the rates it here seeks to assess.

In exercising our jurisdiction under section 2(e)(2), we are directed to consider five factors: (1) whether the shipper was offered a transportation rate by the carrier other than the rate legally on file [section 2(e)(2)(A)]; (2) whether the shipper tendered freight to the carrier in reasonable reliance upon the offered rate [section 2(e)(2)(B)]; (3) whether the carrier did not properly or timely file a tariff providing for such rate or failed to enter into an agreement for contract carriage [section 2(e)(2)(C)]; (4) whether the transportation rate was billed and collected by the carrier [section 2(e)(2)(D)]; and (5) whether the carrier or the party representing such carrier now demands additional payment of a higher rate filed in a tariff [section 2(e)(2)(E)].

Here, Jones concedes at page 10 of its statement that, if section 2(e) is read to apply to this case, it will preclude the Trustee from collecting on his claims. We agree. The evidence establishes that a discounted rate was offered to Nulite by Jones; that Nulite tendered freight in reliance on the agreed-to discounted rate; that the negotiated rate was billed and collected by Jones; and that Jones now seeks to collect additional payment based on a higher rate filed in a tariff. Therefore, under 49 U.S.C. 10701(a) and section 2(e) of the NRA, we find that it is an unreasonable practice for Jones to attempt to collect undercharges from Nulite for transporting the shipments at issue in this proceeding.

This action will not significantly affect the quality of the human environment or the conservation of energy resources.

It is ordered:

1. This proceeding is discontinued.

2. This decision is effective on its service date.

3. A copy of this decision will be mailed to:

The Honorable James G. Mixon
United States Bankruptcy Court for the
Western District of Arkansas,
Fayetteville Division
P. O. Box 2381
Little Rock, AR 72203

Re: A.P. No. 93-8582

By the Board, Chairman Morgan, Vice Chairman Clyburn and Commissioner Burkes.

Vernon A. Williams
Secretary